

Upfront planning is essential for “public construction”



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As public entities, municipal-owned electric utilities are subject to Wisconsin’s public bidding laws. While this is not news to MEUW members, today’s construction environment — featuring continually rising costs and changing project timetables due to equipment shortages and contractor demand — represents a good time to revisit the nuts and bolts of public construction.

Wis. Stat. §196.49 requires municipal utilities to obtain authorization from the Public Service Commission of Wisconsin (PSCW) *before* undertaking construction projects above utility-specific cost thresholds (adjusted on May 1 of each even-numbered year). In some limited instances, PSCW staff may allow the procurement process for certain pieces of critical equipment to begin prior to obtaining the required certificate of authority (CA).

Public bidding requirements apply to public construction projects that exceed an estimated cost of \$25,000 (Wis. Stat. §62.15). The term “public construction” means improvements that require a combination of materials, supplies and labor — such as erecting a building or structure; constructing a distribu-

tion or collection system; or installing a fixture.

Public construction does not include contracts for consulting, engineering, or legal services; neither does it include maintenance, equipment that will not become a fixture, or inventory that is not dedicated to a project. With good planning, working with vendors for a public construction project may provide opportunities to procure extra pieces of equipment with long lead times (such as transformers and breakers) for “inventory” that can be used later, and which do not need to be bid.

Exceptions to public bidding requirements also include work done directly by municipal personnel or by another utility or local government, or repair or reconstruction work that is necessary to address a public emergency, like a collapsed water main or failed transformer. Work that requires use of a patented article, material or processes, in whole or in part, may also be done without following bid requirements, if you furnish the patented item at a reasonable and stated price or obtain consent prior to advertising.

If your project must go out for bid, the statutes lay out requirements for bid advertising and bid opening. Major projects typically require assistance from an outside engineering resource.

The main focus should be on preparing the bid package. Some elements of the

bid package are required to ensure completion of the contract and payment of subcontractors and materials. These include bid bonds and (for projects that exceed \$148,000 in cost) payment and performance bonds with sureties (Wis. Stat. §779.14 (1m)(d)). Some vendors will push the envelope on the requirements. Objections from potential bidders must be rejected and bid responses without them should be deemed incomplete.

Using a detailed pre-qualification application can help screen out potential respondents that do not have the experience, financial wherewithal, equipment, requisite training, or competence needed to successfully complete your project. While the statutes do allow qualification at the time of bid review, pre-qualification allows for obtaining a wide range of pertinent and confidential information from the vendor. This can be useful because the law permits municipal entities to exercise reasonable discretion in rejecting a low bidder as not responsible or responsive.

The construction contract is a critical part of the bid process, establishing the duties and relationship between the owner and the contractor. The engineer is not a party to the construction contract and is not bound by it. For that reason, you should be sure to have a separate contract with your outside engineering resource that is consistent with the construction contract and that clarifies

the scope of respective responsibilities of the engineer and contractor. It is important to ensure the two contracts are appropriately intertwined.

Care must also be given to include detailed plans and specs. The contractor is entitled to rely on these in preparing bids, and unclear or ambiguous plans and specifications will inevitably cause costly delays and change orders down the road. Each contract should also include provisions for contractor performance such as performance standards and times; guarantees and warranties; consequences of delays; treatment of nonconforming work; and allowable retainage.

You should be prepared for pushback. Even carefully drafted contract forms may be greeted by bid awardees with requests for modification, particularly when qualified bidders are in short supply. Be sure to engage an attorney because negotiating with bidders is not permitted.

Time and attention upfront to preparing a comprehensive bid package will go a long way to ensuring project success. In the end, there is no substitute for good project management. Stay informed, establish clear expectations and communication protocols, address issues promptly, and do whatever is necessary to meet the goals of your project. •



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